Supreme Court, U. S.
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IN THE

Supreme Court of the United States

No. 79-293

JERRY YONO,
Petitioner,
v.
COLUMBUS LANDINGS, LTD.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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The Petitioner, JERRY YONO, respectfully prays that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Sixth Circuit entered in the above case July 23, 1979.

OPINION BELOW

The opinion of the Court of Appeals of July, 1979 is set forth in Appendix "A".

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered July 23, 1979. This petition was filed within the thirty (30) day time period specified by the rules of the Supreme Court. The jurisdiction of this Court is invoked under 18 U.S.C. 1254(1).

QUESTIONS PRESENTED

I

WHETHER THE DISTRICT COURT ERRED BY FINDING THAT THE TERM "ALL ROADS" USED IN THE ADDENDUM TO THE CONTRACT IS EQUIVOCAL AND AMBIGUOUS AND CONSEQUENTLY ERRED BY IGNORING THE PLAIN MEANING OF THE WORDS AND RESORTING TO RULES OF CONSTRUCTION AND INTERPRETATION TO GIVE THE WORDS A DIFFERENT MEANING.

II

WHETHER THE DISTRICT COURT ERRED BY FINDING THAT EVEN IF THE TERM "ALL ROADS" MEANT ALL THE ROADS IN THE SUBDIVISION AND NOT JUST THE ACCESS ROAD, THE DEFENDANT-RESPONDENT DID NOT MATERIALLY BREACH THE CONTRACT BY FAILING TO CONSTRUCT THE ROADS WITHIN THE THREE (3) YEAR TIME PERIOD SPECIFIED IN THE ADDENDUM TO THE CONTRACT.

III

WHETHER THE DISTRICT COURT ERRED BY FINDING THAT THE STATEMENTS MADE BY RESPONDENT'S AGENTS TO PLAINTIFF-PETITIONER IN ORDER TO INDUCE HIM TO ENTER THE CONTRACT WERE MERE "OPINIONS" OR "PUFFING" AND NOT FALSE STATEMENTS KNOWINGLY MADE REGARDING MATERIAL FACTS ABOUT THE DEVELOPMENT OF THE ISLAND, THE CONSTRUCTION OF ROADS, AND THE VALUE OF THE PROPERTY.

STATEMENT OF THE CASE

The Plaintiff, JERRY YONO, sought rescission of the contract to purchase land on the Island of San Salvador on the grounds that the Defendant had materially breached a substantial term of the contract and because Plaintiff, in entering into the contract, has relied on materially false representations made by Defendant's agents concerning this property.

On May 17, 1977, following a trial before the Honorable Fred W. Kaess, District Judge, United States District Court, Eastern District of Michigan, the Court entered a Judgment for no cause of action and entered an Order granting Defendant attorney fees and costs. On July 23, 1979 in a per curiam opinion, the Court of Appeals for the Sixth Circuit affirmed.

At trial, the evidence showed that in the early part of 1970 the Plaintiff, JERRY YONO, met with John Wilt, who said he was an agent for Investment Corporation of Florida (ICOF), to discuss Plaintiff's possible investment in land on the Island of San Salvador in the Bahamas. At that time Wilt represented that the Island

was one of the best in the Bahamas and that investors would get their money back with big profits within one (1) year (Tr, 6-8).

In April or May, 1970, Plaintiff met with Mr. Wilt and Sherwood Faubel in Detroit. Faubel said that he was one of the head men of the Bahamian Columbus Landings Project, of which ICOF was said to be the owner and developer (Tr, 11). At that meeting Wilt and Faubel represented to Plaintiff that "all roads" on the Island would be built within three (3) years, that the Island would be developed within one (1) or two (2) years, and that after that time the property would be worth a great deal more than was paid for it (Tr, 14).

MR. YONO, as a Trustee of the YONO Estate, was interested in a hotel site on the Island. No hotel sites were available at that time, but MR. WILT stated that hotel sites would be available in other Subdivisions at a future date (Tr, 16). It was agreed that MR. YONO would purchase land in COLUMBUS LANDINGS I, which had no value as a hotel site and that he would have priority in a hotel site in another Subdivision, either COLUMBUS LANDINGS II, III or IV (Tr, 17). The Plaintiff was not givent the exact location of the lots he would eventually own (Tr, 54) because at the time the Defendant did not know when or where a hotel site would become available.

On May 29, 1970, JERRY YONO signed a Purchase Agreement. The Purchase Agreement provided for the purchase of four (4) or five (5) pieces of property for One Hundred Thousand ($100,000.00) Dollars from COLUMBUS LANDINGS LIMITED, a subsidiary of ICOF (Tr, 20). At this time, MR. YONO paid Ten Thousand ($10,000.00) Dollars down and was to pay the

rest in monthly payments. Paragraph Eight (8) of this Agreement provided that:

> The seller agrees to construct water bonded, graded rock roads *throughout the Columbus Landings Subdivision shown on the plat* and further guarantees that each lot covered by this Agreement will have full frontage on such a road, accessible by automobile, *before the expiration of the contract maturity period.* (emphasis added) (Exhibit #1)

MR. YONO insisted that an Addendum to the Agreement be executed, putting in writing the oral promise made by Wilt and Faubel (Tr, 26). On May 29, 1970, an Addendum to the Purchase Agreement was entered into, which in Paragraph One (1) provided as follows:

> "It is fully understood by the buyer that all roads must be completed with a maximum time limit of three (3) years." (Exhibit 2)

On August 25, 1970, an Amendment to the Purchase Agreement and the Addendum was entered into whereby the project description was changed from *Subdivision I to Subdivision III* (Tr, 26).

Prior to May 29, 1970, MR. YONO, travelled to the Island on several occasions (Tr, 50). At that time there was already a road built circling the entire Island (Tr, 52 and 56). From May, 1970 to July or August, 1974, JERRY YONO made timely payments of approximately Sixty-Nine Thousand Two Hundred Fifty ($69,250.00) Dollars (Tr, 33). The Plaintiff stopped the payments in July or August, 1974 because all the roads in Subdivision III and other Subdivisions had not been

built, he felt he could only get to his property by boat, he felt he did not have adequate access to all parts of his property, and because he saw little construction in Subdivision III and minimal development or construction on the Island as a whole (Tr, 36). This decision to stop payments was also based on an August 27, 1974 letter from COLUMBUS LANDINGS LIMITED stating, among other things, that COLUMBUS LANDINGS had just contracted for the construction of roads in Subdivision II, III and IV (Tr, 38-39). In August, 1974, MR. YONO spoke to MR. FAUBEL and expressed dissatisfaction because the promised roads had not been constructed and the Island was not being developed. At the same time, the Plaintiff demanded his money back because he felt that COLUMBUS LANDINGS had not kept its part of the bargain (Tr, 40). On November 7, 1974, MR. YONO received a letter from COLUMBUS LANDINGS indicating again that temporary financing had permitted them to begin completion of the roads in Subdivisions II, III and IV (Tr, 41-42). In July, 1976, MR. YONO made his last trip to the Island and still saw little improvement on the Island or Subdivision III, although he did observe that two (2) individuals were building homes elsewhere on the Island and that six (6) condominiums had been built on another part of the Island (Tr, 45).

At trial, the defense did not present either MR. FAUBEL or MR. WILT, who has not been seen for four (4) or five (5) years (Tr, 72), and other than JAMES NALL the defense produced no witnesses. According to Mr. Nall, Plaintiff's property in Subdivision III was bordered by the ocean and by part of the road that circled the Island. The stretch of this road that touched the Plaintiff's lots was labeled Discovery Bay Boulevard

(Tr, 88). Mr. Nall stated that the Inn on the Island had been remodeled (Tr, 89), but admitted that no hotels had been built (Tr, 98). Six (6) condominiums were said to have been built by COLUMBUS LANDINGS since 1973 (Tr, 90) but MR. NALL conceded that none had been built prior to 1973 (Tr, 97). He also agreed that most of that which had been done on the Island had taken place after January, 1975. This slack period was described as being due to the fact that in 1973 COLUMBUS LANDINGS had intentionally shut down its sales operation because of the fuel crisis and the collapsing real estate market. The Plat for Subdivision III, as well as that for the other Subdivisions, called for roads but MR. NALL was not familiar with the roads that had been scheduled to be built in Subdivisions according to the Plat drawn up in May, 1970 (Tr, 99-100), and he did not know which of those roads had been completed by May, 1973.

ARGUMENT

I

THE DISTRICT COURT ERRED BY FINDING THAT THE TERM "ALL ROADS" USED IN THE ADDENDUM TO THE CONTRACT IS EQUIVOCAL AND AMBIGUOUS AND CONSEQUENTLY ERRED BY IGNORING THE PLAIN MEANING OF THE WORDS AND RESORTING TO RULES OF CONSTRUCTION AND INTERPRETATION TO GIVE THE WORDS A DIFFERENT MEANING.

Paragraph eight (8) of the Purchase Agreement entered into between Plaintiff and Defendant on May 29, 1970, provides:

> "The seller agrees to construct water bonded, graded rock roads *throughout the Columbus Landings Subdivision shown on the plat* and further

> guarantees that each lot covered by this Agreement will have full frontage on such a road, accessible by automobile, *before the expiration of the contract maturity period.*" (emphasis added)

The Addendum to the contract entered May 29, 1970 provides:

> "It is fully understood by the buyer that all roads must be completed within a maximum time of three (3) years."

The Defendant stipulated at trial that this Addendum applied to each of the changes made in the legal description of Plaintiff's property, including the lots in the final transfer to Subdivision III (Tr, 15).

The Plaintiff's position at trial was that by agreeing to the Addendum the Defendant had agreed to construct *all roads* in all of the four (4) Subdivisions within three (3) years of May 29, 1970, and that the failure to do so was a breach of a substantial term of the contract that demanded rescission. The Court rejected this argument and held that the parties had understood "all roads" to mean *all access roads* to all four (4) Subdivisions. Plaintiff contends that this interpretation or construction of the contract was unsupported by the evidence and was the result of an erroneous application of the law of Michigan.

It is well established that rules of construction are resorted to only where the language of the contract is ambiguous and susceptible of different meanings. *Berk* v. *Gordon Johnson Company*, 232 F. Supp. 682, 687 (E.D. Mich. S.D. 1964). If the terms of a contract are not ambiguous, the terms control and any intent of the

parties differing from those terms cannot be read into the contract. *Dunn* v. *Detroit Federation of Musicians*, 268 Mich. 698 (1934). The Courts do not write contracts for the parties nor do they read into an unambiguous contract words or provisions it does not contain. *Florida Canada Corp.* v. *Union Carbide & Carbon Corp.*, 280 F2d 193, 196 (6th Cir. 1960).

There can be little doubt that "all roads" by itself is unambiguous and not subject to differing meanings. Neither is an ambiguity created by the fact that Paragraph Eight (8) of the Purchase Agreement refers to ". . . the Subdivision . . . shown on the plat . . ." while the Addendum does not. Where separate documents were executed at the same time by the same parties, refer to one another, and relate to the same matter, the separate instruments are construed together as the Agreement of the parties. *West Madison Inv. Co.* v. *Fileccia*, 58 Mich. App. 100, 106 (1975); *C. J. Rogers, Inc.* v. *Highway Dept.*, 36 Mich. App. 620 (1971).

When the Purchase Agreement and the Addendum are read together as a whole to determine the agreement between the parties, "all roads" does not become subject to any unique or different meanings. On May 29, 1970, the Plaintiff knew his property would be located in either Subdivision II, III or IV. His insistence on the Addendum was to ensure that the Island and his property would be developed as promised and the Addendum clearly provided that *all roads* would be constructed within three (3) years without limiting that language to any particular Subdivision or road. Under these circumstances, it was unreasonable and erroneous for the Court to conclude that "all roads" could have more than one meaning and that at the time of the

contract the parties only intended that language to apply to the one road granting access to the four (4) Subdivisions. This finding is particularly erroneous where the Plaintiff testified to the contrary and where the Defendant did not present any evidence on that issue. The defense did not produce either MR. FAUBEL or MR. WILT, the two (2) men who negotiated with MR. YONO for the Defendant. The only witness for the Defendant was MR. NALL, a corporate officer who played no role in negotiating either the Purchase Agreement or the Addendum and who was not even familiar with the roads planned for the Subdivisions or the Island. The Defendant at no time, either in the Answer, Amended Answer or during trial, contended that "all roads" only meant the access to Plaintiff's property, and presented no evidence to support that position.

Paragraph Eight (8) of the Purchase Agreement referred to roads in ". . . the . . . Subdivision . . . shown on the plat . . ." while the Addendum related to "all roads" without mentioning any particular Subdivision. It was never satisfactorily established at trial which Subdivision or plat the above paragraph was referring to. When MR. YONO went to the Island prior to signing the contract, the Defendant had shown him a diagram, map or plan of the entire Island, which included the streets of all four (4) Subdivisions. Since the parties knew Plaintiff's land would not be in Subdivision I, it would have been unlikely that they would have intended "all roads" to cover only Subdivision I, even if that was the Plat originally referred to in the Purchase Agreement. No ambiguity should be found in this regard in that it is more sensible to conclude that the Addendum was intended

to relate to all roads in all Subdivisions. This is particularly true since the Defendant stipulated at trial that the Addendum applied to both property transfers made.

The finding that the parties understood "all roads" to mean all access roads was a strained interpretation that gave the words something other than their usual and ordinary meaning, was unsupported by any evidence and was the result of the Court's reading into an unambiguous contract words it did not contain. In effect, the Court drafted a new contract for the parties. Nowhere in its Opinion did the Court describe the evidence it had relied on to interpret "all roads", and the interpretation reached was not supported by the evidence brought out at trial.

When MR. YONO first visited the Island prior to May 29, 1970, there was one road circling the Island. According to the master plan for the entire Island, which MR. YONO was shown at this time, this one road was intended to provide access to all four (4) Subdivisions. According to Judge Kaess, it was this single road that the parties intended the Addendum to cover, but such an understanding is extremely unlikely considering the circumstances existing at the time. On May 29, 1970, the Plaintiff and the Defendant knew that this one road would circle the Island and provide access to the four (4) Subdivisions. This being so, the ruling that the parties intended "all roads" to mean all access roads is even more difficult to comprehend. Rather than numerous access roads there was only a single road circling the Island. If the parties had intended the Addendum to cover only the single road around the Island, "all roads," a plural, would not have been the

appropriate language. Further, as the single road was there when the Plaintiff first visited the Island prior to signing the contract, it is unlikely that he intended the Addendum to relate only to a road that was already in existence.

For these reasons, Plaintiff contends that "all roads" is unambiguous and was shown by a preponderance of the evidence to refer to all of the roads in the four (4) Subdivisions, rather than to the one access road. Unambiguous language in a contract must be held to express the intention of the parties. *Ginsberg* v. *Linen Service Co.*, 292 Mich. 70 (1940).

In *Ginsberg, supra*, a contract providing that the salary of employees would not abate because of illness or disability was held to mean exactly that. The contract did not state that only brief or casual illness were covered, and the Michigan Supreme Court held that the clear and unambiguous terms of the contract could not be read otherwise. Like the contract language in *Ginsberg, supra, "all roads"* is clear, unequivocal and unambiguous, and should have been given its common and ordinary meaning. It was error for the trial court to avoid this plain language by finding a contrary intention by the parties. Unambiguous language must be held to express the intention of the parties, *Ginsberg supra*, and in such a situation it is error to resort to rules of construction and interpretation. *Berk, supra*.

In construing any contract, the words used should be given their ordinary meaning unless good reason is shown why this should not be done. *American States Insurance Co.* v. *Stachowski*, 249 F. Supp. 189, 193 (E.D. Mich. S.D. 1965). In *Stachowski*, an insurance policy stated that "all operations" of the Defendant's

construction business were covered, but then went on to list thirty-eight (38) exclusions which the insurance company claimed limited coverage. The insured was seeking compensation for the damage caused by the escape of large quantities of liquids he had stored on his property on the basis that since it was part of his business it fell within the "all operations" language of the contract. The Court held at 193 that words should normally be given their ordinary meaning and said that under this general rule "all operations" would mean exactly that. Under this rule of law, there would be no limitations on liability. However, since the activity involved, storing large quantities of liquids, was not a normal activity for Defendant's business, and as it had traditionally been regarded as an ultra-hazardous activity, the Court held the risk to be so great that coverage under a standard insurance policy would not have been intended. In other words, there was good reason for not giving the words their ordinary meaning.

Under the facts of the instant case, unlike those in *Stachowski, supra*, the failure to give "all roads" its plain and literal meaning was unjustified. There was no good reason for holding that "all roads" meant all access roads when that interpretation was contrary to their plain meaning. The Plaintiff had seen the Defendant's master plan for the entire project, including all four (4) Subdivisions. At the time of the Addendum, the parties were aware of these detailed plans for future development and it was not as if Subdivisions II, III and IV were completely unorganized dreams of the future. When the plans for Subdivisions II, III and IV were in existence and when the Defendant's agents

stated that the entire Island would be developed within a few years, it is not at all unlikely that the parties understood "all roads" to have their literal meaning.

II

THE DISTRICT COURT ERRED BY FINDING THAT EVEN IF THE TERM "ALL ROADS" MEANT ALL THE ROADS IN THE SUBDIVISION AND NOT JUST THE ACCESS ROAD, THE DEFENDANT-RESPONDENT DID NOT MATERIALLY BREACH THE CONTRACT BY FAILING TO CONSTRUCT THE ROADS WITHIN THE THREE (3) YEAR PERIOD SPECIFIED IN THE ADDENDUM TO THE CONTRACT.

Michigan Courts have permitted rescission as a remedy for a material breach of contract. *Rosenthal* v. *Triangle Development Co.*, 261 Mich 462 (1933). But the District Court held that assuming Plaintiff's interpretation of "all roads" to be correct, Defendant's failure to construct all the roads in Subdivisions II, III and IV within three (3) years of May 29, 1970, was not a material breach, citing *Walker and Co.* v. *Harrison*, 347 Mich 630, 635 (1957).

However, Section 266 of the *Restatement 2d, Contracts* (Tentative Draft, 1973), provides:

> In determining whether a failure to perform or to make an offer to perform is material, the following circumstances are significant:
>
> (a) The extent to which the injured party will be deprived of the benefit which he reasonably expected;

> (b) The extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived;
>
> (c) The extent to which the party failing to perform or to offer to perform will suffer forfeiture;
>
> (d) The likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances;
>
> (e) The extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.

See also *Restatement of Contracts*, Section 275.

In the instant case, JERRY YONO and COLUMBUS LANDINGS agreed that all roads in all Subdivisions would be built within three (3) years. While the Plaintiff did receive a hotel site, the only road completed on the Island or in Subdivision III within the three (3) year period was the one road circling the Island which granted access to Plaintiff's property. A single road around an Island cannot be said to provide the same benefit the Plaintiff anticipated, that is, roads constructed throughout all the Subdivisions.

MR. YONO had insisted on the Addendum under the belief that the construction of these roads would ensure the promised development of the Island. In fact, neither the promised road construction or Island development have yet occurred. Under these circumstances it is almost impossible to place Plaintiff in the position he

would have been in in 1973 had the contract not been breached. The difference between the actual value of the Plaintiff's property in 1973 and its value if all the roads had been built is impossible to ascertain and would be mere speculation. The extent to which the construction of the roads and the development of the Island would have increased the value of the hotel site cannot be determined.

MR. YONO demanded that the contract be rescinded and his money returned in August, 1974, and the Court should have examined the circumstances then, not those existing in May, 1977, when determining whether the breach was material. It is the extent to which the defendant had performed in May, 1973 or August, 1974 that is pertinent. In August, 1974, very little had been done on the Island and almost nothing had been done on Subdivison III. The Inn referred to by the Court had been on the Island since 1970. Other than six (6) condominiums that had been built on the Island, most if not all of the improvements mentioned by the Court were made after January, 1975, and most, if not all, were on parts of the Island other than Subdivision III. This lack of development was a result of the Defendant's intentional efforts to halt land sales and construction. Regardless of whether this failure of performance was due to the fuel crisis or a real estate crash, it cannot be labeled an exercise of good faith or fair dealing when the Defendant, through its agents, had led the Plaintiff to believe that all the roads would be built, and the entire Island developed within three (3) years.

The Michigan case that is most on point, and which the Trial Court failed to consider, is *Brow* v. *Gilbralter Land Co.*, 249 Mich 662 (1930). There, *Brow* brought

suit to recover money he had paid as part of the contract price of a lot. The lot was part of a Subdivision in which the Defendant had agreed to make certain improvements such as roads, canals and bridges. The Defendant had been enjoined from making the improvements in question, and little had been done to complete any of the improvements. The Plaintiff testified that the land had been purchased for boat storage and that he was unble to do so without the canals, streets and bridges provided for in the contract. Plaintiff's theory was that since the improvements were not completed within a reasonable time he had the right to rescind and to recover the sums paid. The Michigan Supreme Court agreed. The Defendant's failure to construct the improvements within a reasonable time was held to be a breach of contract that justified rescission.

Except for the fact that the improvements here were to have been completed within a specific time period, the instant case is very similar to *Brow, supra.* COLUMBUS LANDINGS contracted to build all roads in all Subdivisions but did not do so. By August, 1974, instead of having a valuable hotel site in a Subdivision with residential roads on an Island composed of four (4) Subdivisions with residential roads, the Plaintiff found himself the owner of a lot of an undeveloped Island with one access road. The lack of roads through each Subdivision denied the Plaintiff the advantage of owning a hotel site on an Island consisting of four (4) developed Subdivisions as he had been promised. In *Brow, supra*, the land could not be used as a purchaser had intended, and here the failure to make improvements deprived the Plaintiff of the environment he had anticipated.

For the above reasons, the failure to build all roads in all Subdivisions with three (3) years was a material breach of contract justifying rescission according to *Brow* v *Gilbralter Land Co., supra*, §275 of the *Restatement* and §266 of the *Restatement, 2d* and the District Court and Court of Appeals clearly erred in ruling otherwise.

III

THE DISTRICT COURT ERRED BY FINDING THAT THE STATEMENTS MADE BY DEFENDANT-RESPONDENT'S AGENTS TO PLAINTIFF-PETITIONER IN ORDER TO INDUCE HIM TO ENTER THE CONTRACT WERE MERE "OPINION" OR "PUFFING" AND NOT FALSE STATEMENTS KNOWINGLY MADE REGARDING MATERIAL FACTS ABOUT THE ISLAND DEVELOPMENT, THE CONSTRUCTION OF ROADS, AND THE VALUE OF PLAINTIFF'S PROPERTY.

Rescission of a contract can be based on unconscionable conduct, fraud or material misrepresentations. *O'Connor* v *Bamm*, 335 Mich. 438, 443 (1953). Proof of fraud or material misrepresentations consists of a showing:

> (1) that defendant made a material representation; (2) that it was false; (3) that when he made it he knew that it was false, or made it recklessly, without any knowledge of its truth and as a positive assertion; (4) that he made it with the intention that it should be acted upon by plaintiff; (5) that plaintiff acted in reliance upon it; and (6) that he thereby suffered injury.
>
> *Head* v *Benjamin Rich Realty Co.*, 55 Mich App. 348, 358 (1974).

The evidence adduced at trial, which was never contradicted or denied by COLUMBUS LANDINGS, was that prior to and during the signing of the contract the agents of the Defendant, MR. WILT and MR. FAUBEL, repeatedly told MR. YONO: The Island would be the best in the Bahamas and within one year the Plaintiff would get his money back with a big profit (Tr, 8), that the Island would be developed within a year or two, that the Island would be a gold mine within a year or two, the hotel property would sell for "a heck of a lot more" than the Plaintiff paid for it (Tr, 15), that it was a terrific investment and would be developed within a couple of years and that the buyer could make a large profit on it, could sell it for a bigger price and there would not be any problem with COLUMBUS LANDINGS selling it (Tr, 23). MR. FAUBEL clearly stated that all roads on the land owned by COLUMBUS LANDINGS would be completed "way before" three (3) years time (Tr. 24). MR. YONO was interested in all four (4) Subdivisions as well as the roads in those Subdivisions and that is why he insisted on the Addendum. At trial, MR. YONO stated that if he had known in May, 1970 that all roads would not have been completed within three (3) years he would not have entered into the Agreement (Tr, 46-47).

Where misrepresentations are made by an agent the principals can be held liable, *Head, supra*, and MR. WILT and MR. FAUBEL were acting as Defendant's agents. Plaintiff contends that the actions of the Defendant's agents fall within the above description and that as a result he is entitled to rescission.

The court treated the Defendant's promises regarding the value of the property as being entirely separate from the other alleged misrepresentations and held they were mere "puffing" on the part of the seller that were expressions of opinion that could not be taken seriously. As authority, the Court cited *Hayes Construction Co.* v *Silverthorn*, 343 Mich 421, 426 (1955). While *Silverthorn, supra*, does stand for this position, the facts of that case are distinguishable from those in the case at bar. In Silverthorn, an experienced builder had ordered furnaces for a project based upon representations made about their quality. The Court declined to consider whether these representations were fraudulent because they were seen as expressing only the opinion of the seller. However, the Court recognized that this principle does not mean that all such misrepresentations are not actionable.

> One party may have special knowledge and the other none and without the means of getting it. In this case, the latter cannot fairly and reasonably exercise his own judgment. The parties, therefore, do not stand on equal terms and the buyer has right to rely upon the representations of excellence made by the seller. *Silverthorn, supra*, at 426-427.

The instant case falls within the above area of fraud and the trial court erred in finding otherwise. JERRY YONO had no special knowledge of the plans for the development of the Island or for the construction of the roads and he could only rely on the promises of MR. WILT and MR. FAUBEL. Visiting the Island prior to signing the contract could in no way expand MR. YONO'S ability to measure the accuracy

of the representations that all roads would be built within three (3) years, the entire Island would be completely developed within a few years, and that this would greatly increase the value of his property.

When considered in this light, the representation that the hotel property would greatly increase in value within a few years must be regarded not as an opinion, but rather as a statement of fact. Representations of value can be statements of fact, rather than expressions of opinion, under circumstances where the seller has particular knowledge of the property and the purchaser was without such knowledge. *Sutton* v *Benjamin*, 231 Mich 153 (1925). Here, MR. WILT and MR. FAUBEL, men who presented themselves as agents, employees or officers of COLUMBUS LANDINGS, stated that the property owned on San Salvador would be developed within two (2) or three (3) years of 1970, and that as a result the Plaintiff's property in this completed project would be greatly more valuable within this short period of time. These were statements of material fact which Plaintiff had a right to presume were within the knowledge of the Defendant's agents, employees or officers, and of which they knew MR. YONO had no knowledge. See, *Kefuss* v *Whitley*, 220 Mich 67 (1922) where a real estate owner's statements concerning the value of the property Plaintiff was investing in and the profits he could expect to earn were held to be statements of fact the Plaintiff could rely on and which justified rescission because of their inaccuracy.

While actionable fraud may not be predicated on erroneous predictions as to future conduct:

> The speaker cannot escape liability on the plea that his statements related to the future if he

> misrepresented hopes as facts, contingencies as existing conditions, or contemplated arrangements as arrangements already agreed on. *Kefuss* v *Whitley, supra*, at 83.

This is exactly what the Defendant did through its agents. The completion of all roads and the development of the entire Island within two (2) or three (3) years were not presented as speculation or hopes, but as conditions or facts. JERRY YONO purchased the property in question because of the representations that within a relatively short period of time, two (2) or three (3) years, he would own a hotel site on a completely developed Island. Under these circumstances, the Plaintiff's hotel site would almost certainly increase in value, and the Plaintiff had no reason for concluding that the representations made to him were false and not based on special knowledge.

Accordingly, rescission of the contract is proper and the Trial Court ignored the great weight of the evidence in holding otherwise.

CONCLUSION-RELIEF REQUESTED

For the above reasons, Petitioner, JERRY YONO, contends that "all roads" was intended to mean, and did mean, all roads in all Subdivisions, and that COLUMBUS LANDINGS' failure to complete the roads within three (3) years was a breach of contract. The breach was material and justified rescission because it deprived the Plaintiff of the benefits he had reasonably anticipated; that is, a hotel site on an Island that within three (3) years would be composed of developed Subdivisions. Further, the contract should be rescinded

for the reason that the Plaintiff was enticed into the contract by knowingly false representations of fact made by the Defendant's agents that were not within the Plaintiff's knowledge, to wit: that the Island would be fully developed with a few years, the roads would all be built within three (3) years, and that as a result the Plaintiff's property would greatly increase in value within this short period of time.

For the foregoing reasons, Petitioner, JERRY YONO, respectfully prays that a Writ of Certiorari issue to review the judgement of the United States Court of Appeals for the Sixth Circuit in this case.

Respectfully Submitted,

BELL AND HUDSON, P.C.

By: EDWARD F. BELL P10652
Attorneys for Petitioner

Dated: August 17, 1979

APPENDIX A

OPINION

(United States Court of Appeals for the Sixth Circuit)

(Decided and Filed July 23, 1979.)

(JERRY YONO, Plaintiff-Appellant, v. COLUMBUS LANDINGS, LTD. Defendant-Appellee. No 77-1441)

Before: WEICK, CELEBREZZE, and KEITH, Circuit Judges.

The Court delivered a per curiam opinion. KEITH, Circuit Judge, (p. 3) delivered a dissenting opinion.

PER CURIAM. Yono's suit in the District Court was for rescission of a written contract entered into by him on May 29, 1970, with Columbus Landings, Limited, (Columbus) a development corporation, for the purchase of vacant lots on the Island of San Salvador, Bahamas. Yono purchased the land for investment purposes. He wanted a site on which a hotel could be erected. The site he purchased could not be used for any such purpose but it was agreed that it could be exchanged for such a site when it became available in the planning of three more subdivisions on the island.

The contract provided that Columbus would build access roads to each lot covered by the contract prior to the expiration of the contract maturity date which was eight years. Yono insisted the roads be built within three years and an addendum was entered into providing therefor.

A year later an agreement was entered into transferring Yono's land in Columbus Landings No. 1 to the promised hotel site in Columbus Landings No. 3

which was bounded on two sides by the ocean. For several years thereafter Yono continued to make payments on the contract. The access road to Yono's lots was completed in March 1972. In August 1974 Yono ceased payment on the property and demanded return of the money he had paid. He claimed that Columbus had not built roads on all of the subdivisions on the island within three years and that representations made by the agents of Columbus were materially false and knowingly fraudulent. He filed suit for rescission in the District Court. Jurisdiction was based on diversity of citizenship.

The District Judge, sitting at a bench trial, interpreted the contract. He held that there was no breach of contract by Columbus since "all roads" meant all access roads and the one access road on the island had been timely built. He also found that the contract had been materially and substantially performed by Columbus. He also found that Columbus had made no fraudulent representations; that opinions given as to the value of the land made by agents of Columbus were mere "puffing' and were not actionable.

The District Judge applied Michigan law which conforms to the criteria set forth in Restatement of the Law of Contracts (1933) to determine whether a breach is material. *Walker & Co.* v. *Harrison*, 347 Mich. 630; 81 N.W. 2d 352 (1957). Thus, even if there was a breach, the court found it was not material.

We are of the opinion that the findings of fact of the District Court are supported by substantial evidence and are not clearly erroneous. Its conclusions of law are correct.

We affirm the judgment of District Judge Kaess for the reasons herein stated and as amplified in his memorandum opinion. It is so ordered.

KEITH, Circuit Judge, dissenting.

Mr. Yono, the plaintiff, ended up with a block of land in subdivision III of the defendant's real estate development on the island of San Salvador. It is undisputed that he wished to build an hotel on his land and that he insisted on a contractual term that "all roads must be completed within a maximum time limit of three years."

I think that "all roads" means what it says and should be given its plain meaning. Further, in light of evidence that there is only one "access" road around the island, which was in existence when the contract was signed, I see no basis for the district court's conclusion that "all roads" meant "all access roads."

Contrary to the district court, I further believe that this breach was material. The plaintiff was interested in investing in an hotel site and bought the land on that understanding. The defendant's failure to build all of the roads on time hampered development which would have increased the desirability and profitability of building an hotel. Given that plaintiff's investment was was [sic] made with the view to building an hotel and that the plaintiff specifically insisted that all roads be built within three years, I do not see how the breach could be anything but material.

I would reverse and remand with directions to grant recission [sic] of the contract.